73-1933

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 73-193

UNITED STATES,
Appellant,

vs.

CITIZENS & SOUTHERN NATIONAL BANK, ET AL.,
Appellees.

Motion by Independent Bankers Association of Georgia, Inc. for permission to file Brief Amicus Curiae and Brief

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CASE NO. 73-193

UNITED STATES,
APPELLANT

vs.

CITIZENS & SOUTHERN
NATIONAL BANK, ET AL,
APPELLEES

MOTION OF INDEPENDENT BANKERS ASSOCIATION OF GEORGIA, INC. FOR PERMISSION TO FILE BRIEF AMICUS CURIAE

The Independent Bankers Association of Georgia, Inc., a non-profit corporation composed of 209 independent banks of Georgia, moves this Court to grant it permission to file a brief amicus curiae in the above case; all of the parties not having consented to the filing of said brief.

PETITIONER'S INTEREST

Petitioner is vitally interested in maintaining an independent and competitive banking system in Georgia as provided by the laws of Georgia.

> ". . . It is the intent of this Act to prevent the extension of statewide banking by any institution and to encourage the normal growth of banking units in the local communities . . . It is the intent of this Act to restrict further the acquisition of voting shares of banks by bank holding companies." (Georgia Laws 1960, p. 67)

The decision of the District Court if upheld will bar the enforcement of the judgment of the Supreme Court of Georgia in the case of Petitioner vs. Dunn, Citizens & Southern National Bank, et al, (230 Ga., 345; 197 SE 2d, 129).

This judgment resulted from an action by petitioner for a mandamus against the Superintendent of Banks of Georgia (now the Commissioner of Banking and Finance) naming as co-defendants the Citizens & Southern National Bank, the Citizens & Southern Holding Company and ten other Georgia banks in back of which the Holding Company owned five per cent of the capital stock, one being the Citizens & Southern South DeKalb Bank.

The complaint alleged that the Citizens & Southern National Bank and the Citizens & Southern Holding Company, in violation of the law of Georgia owned or controlled, indirectly or directly, more than five per cent of the voting shares of the ten named banks.

Briefly stated the evidence conclusively proved that (1) the Citizens & Southern National Bank owned all of the stock of the Citizens & Southern Holding Company, (2) whether the bank sponsored the formation of a new bank or purchased five per cent of an established bank, it made certain that additional shares of stock ranging from fifteen to fifty per cent were acquired for its officers, directors, employees and stockholders, (3) that after such acquisition the name of the bank was changed with the letters "C & S" being prominent in the new name, (4) one or more officers of the Citizens & Southern National Bank were placed on the Board of Directors of the bank, (5) no president of any bank so acquired was elected without the prior approval of the President of the Citizens & Southern National Bank, and (6) a designated officer of the Citizens & Southern National Bank exercised direct supervision over the business of the bank to the extent of recommending the salary to be paid to the president of such bank.

The trial judge denied the mandamus absolute. On appeal the Supreme Court reversed, holding:

> ". . . The independence of these ten five per cent defendant banks, which the banking Act seeks to preserve, is lost. We hold that the Citizens & Southern National Bank and the

> Citizens & Southern Holding Company are directly and indirectly holding and controlling more than five per cent of the voting stock of the ten five per cent defendant banks." (P. 363)

It held that the trial judge erred in failing to issue the mandamus prayed for.

On the second appearance of the case (231 Ga., 421; 202 SE 2d, 78) the Supreme Court held that the trial judge erred in giving the Commissioner specific directions as to the manner in which the Commissioner should require compliance with the law, and held that the manner of enforcement should be left to the expertise of the Commissioner.

Thereafter, the trial judge issued a mandamus ordering the Commissioner to take appropriate action against the Citizens & Southern National Bank and the Holding Company to comply with the holding company law of Georgia in accordance with the decision of the Supreme Court.

Pursuant to this order the Commissioner issued a lengthy directive to the Citizens & Southern National Bank requiring it to take described specific actions which the Commissioner "deemed necessary to bring about a divestiture of what the court has determined is direct and indirect control of certain banks by the Citizens & Southern National Bank."

The actions were to be taken over a period ending on May 24, 1975.

On the same date the Commissioner ordered fifteen other Georgia five per cent banks which the Commissioner found had the same relation to the Citizens & Southern National Bank and its Holding Company as the ten named banks to take the same actions. The additional banks included five of the banks named in the caption of this case.

Manifestly, if these six banks are merged into the Citizens & Southern Emory Bank and the Citizens & Southern Bank of East Point respectively, the order of

the Commissioner as to these banks will become abortive as to such banks.

FACTS AND QUESTIONS OF LAW WHICH PETITIONER BELIEVES WILL NOT BE ADEQUATELY ARGUED BY THE PARTIES

Petitioner believes that the Appellant does not place sufficient emphasis on the fact that the Supreme Court of Georgia has unequivocally condemned the deprivation of the independence of these five per cent banks by the Citizens & Southern National Bank.

Neither does the Appellant give sufficient faith to the efficacy of the judgment of the Supreme Court of Georgia and the order of the Commissioner of Banking and Finance to restore the independence of the five per cent banks.

Petitioner believes that the Appellant will not adequately argue that the law of Georgia controls with respect to branch banking and bank holding companies.

Petitioner does not believe the Appellant will adequately argue the principle of law that in gaining control of these banks in violation of the law of Georgia, the Citizens & Southern National Bank's claim of non-competition between these six banks is not tenable.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF INDEPENDENT BANKERS ASSOCIATION OF GEORGIA, INC.

I

DECISION OF SUPREME COURT OF GEORGIA

Petitioner submits that the Supreme Court of Georgia recognized that the Legislature of Georgia had clearly expressed its intent to preserve the independence of the local bank. The Supreme Court said:

> "There are two conflicting philosophies concerning the banking business. There are those who believe that the control of additional banks by large financial interests will ultimately destroy independent banks and result in the domination of the economy by too few persons. There are those who believe that larger financial interests can offer a wider variety of services and can better provide the capital to meet the needs of borrowers. This conflict must be resolved by the legislature and not by this court . . . The legislative intent is expressed clearly in the banking laws which provide in Section 1 (Ga. L. 1960, pp. 67, 68): 'It is the intent of this Act to prevent the extension of statewide banking by any institution and to encourage the normal growth of banking units in the local communities . . . It is the intent of this Act to restrict further the acquisition of voting shares of banks by bank

holding companies . . .' " (Independent Bankers Association of Georgia, Inc. v. Dunn, et al, 230 Ga. 345, p. 360-1, 197 S.E. 2d. 129.)

The reduction of the percentage of stock which a Holding Company could acquire from fifteen per cent (Ga. L. 1956, pp. 309-12) to five per cent indicated the determination of the Legislature of Georgia to preserve the local independent bank.

The court then proceeded to show by undisputed evidence the manner in which the officers of the Citizens & Southern National Bank had distributed the stock of these acquired banks among its directors, officers, wives of officers and employees, how immediately upon the acquisition it placed an officer of the Citizens & Southern National Bank upon the Board of Directors of each of these banks, then elected another officer of the Citizens & Southern National Bank to become president of the controlled bank and generally exercised supervision and control over these banks.

The Supreme Court held:

"The officers and directors are the alter egos of the bank. It is clear under the evidence here that they are doing indirectly that which cannot be done directly. The independence of these ten five per cent defendent banks, which the banking Act seeks to preserve, is lost." (P. 363)

Clearly, it was the intent of the Supreme Court that these five per cent banks be freed from the domination and control of the Citizens & Southern National Bank and its Holding Company.

The argument that the control of these five per cent banks arose from a voluntary desire of the banks is contradicted by the evidence.

Why did the Citizens & Southern National Bank when it organized a new bank like the Citizens & Southern South DeKalb Bank make certain that its officers, employees and their wives held at least fifty per cent of the stock? The same was true with respect to the Citizens & Southern Bank of Dalton. When the Superintendent of Banks refused to issue a charter

since more than fifty per cent of the stock was held by the Citizens & Southern National Bank's officers, employees and their wives, the President of the Citizens & Southern National Bank had local citizens subscribe for additional shares, but in order to make certain that the Citizens & Southern National Bank controlled the bank, had the shares transferred to his wife who paid for them without disclosing this secret arrangement to the Superintendent of Banks. Indeed the President of the Citizens & Southern National Bank admitted that he would not have bought five per cent of the stock of a bank unless he could have obtained additional shares for his officers and directors.

Obviously, the answer is plain that the Citizens & Southern National Bank recognized that the control of these banks rested on substantial stock ownership by the Holding Company and its officers, directors, employees and their wives.

> "The decision of the State that quo warranto lies at the suit of state officials in a State Court to determine whether or not a national bank has violated a state statute is conclusive on the federal courts where the statute is within the power of the state and valid, and the fact that it becomes necessary to determine the rights of the bank under the federal law is immaterial." (*First National Bank of St. Louis vs. State of Missouri* at inf. Barrett, Mo. 1924, 44 S.Ct. 213, 263 U.S. 640, 68 L.Ed. 486)
>
> "Federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy, and so as to avoid any unnecessary interference by injunction with the lawful action of state officers." (*Commonwealth of Pennsylvania vs. John C. Williams,* 79 L.Ed. 841; 55 SC, 380)

This court must assume that the Supreme Court of Georgia did not do a vain and useless act. If the court had not believed that the independence of these banks and their ability to compete could be restored and es-

tablished by the termination of indirect and direct control of these banks, it would have never ordered that a mandamus be issued directing the Commissioner to enforce this law.

II

THE ORDER OF THE COMMISSIONER

The directive issued to these banks by the Commissioner of Banking and Finance spelled out in detail the performance of those acts by the Appellees which the Commissioner declared were necessary to terminate the indirect control of these banks.

The first paragraph of his order directed the termination of direct and indirect supervision of these banks beyond that which is available to any normal correspondent bank. To be sure the Commissioner's directive does not require complete performance of this part of his order until May 24, 1975. Obviously, the extension of time was occasioned by his knowledge of the rigidity of the supervision of the Citizens & Southern National Bank and the difficulties which would be sustained by these banks if complete termination was ordered at once.

The directive required the resignation of any officer or director of the Citizens & Southern National Bank who served as director of these five per cent banks.

It also required the policymaking officers of the Citizens & Southern National Bank to dispose of the stock which they had acquired in connection with the acquisition by the Holding Company of its stock.

The Commissioner also ordered all outdoor signs and advertising of the five per cent banks to show that part of the bank's name which distinguished it from the Citizens & Southern National Bank.

The Holding Company was also ordered to divest itself of its five per cent holding in each of these banks if the stockholders of the Citizens & Southern National Bank owned sufficient stock in such banks to make the total of the stock held by the Holding Company and the

stockholders exceed five per cent of the stock of the banks.

Manifestly, if this directive is fully complied with the control of the Citizens & Southern National Bank of these five per cent banks will be ended. They will be in a position to engage in meaningful competition with each other as well as the Citizens & Southern Emory Bank and the Citizens & Southern Bank of East Point.

Even if this order does not achieve its objectives, this court must assume that the Commissioner of Banking and Finance will issue further directives as are necessary to obtain the result ordered by the Supreme Court.

Therefore, the trial judge grievously erred in holding that the decision of the Supreme Court would not establish competition between the banks.

III

THE SUPREME COURT'S JUDGMENT

The decision of the District Court noted that the jurisdiction of the Court did not relate to the enforcement of the banking laws of the State of Georgia, and that the Citizens & Southern National Bank's disregard of Georgia's banking law "is only relevant to the issue of whether the effect of the proposed mergers 'may be substantially to lessen competition' ".

To be sure federal courts do not enforce the decisions of the Supreme Court of Georgia, but as shown by the decisions hereinbefore cited and many more, the federal courts are bound to respect and give full effect to the decisions construing the bank holding company laws of this state. The Supreme Court's direction that a mandamus issue to require the Commissioner of Banking and Finance to take appropriate action to enforce the bank holding company laws of Georgia is binding upon the federal courts.

Implicit in the recent decision of this court in *United States v. Marine Bancorporation, Inc. et al*, 41 L.Ed.2d, 978 is the conclusion that if the Supreme Court of Washington had held that sponsorship of a new bank

did not violate that State's law, this court would have unhesitatingly followed that rule.

The Supreme Court of Georgia has spoken in no uncertain terms as to the meaning of the Georgia holding company law condemning the acquisition of stock in a bank by a holding company.

Inevitably, the logical result is that if there had not been such illegal control of the five per cent banks by the Citizens & Southern National Bank they would have been independent and competitive banking entities.

IV

THE CITIZENS & SOUTHERN NATIONAL BANK CAN REAP NO BENEFIT FROM ITS ILLEGAL CONTROL OF THESE BANKS

Many years ago Justice Cardoza speaking for this court said:

> "Enough for present purposes that the disability has its roots in a principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong." (R. H. Stearns Co. vs. United States, 291 US 54, 61-2; 78 L. Ed. 647, 653)
>
> "No one should be permitted to profit by, or take advantage of his own wrong." (Equity Section 94; 30 CJS 1015)

Apparently, the trial judge was under the belief that if the violation of the law by the Citizens & Southern National Bank was only technical, the resulting stifling of competition by and among these five per cent banks and the two Citizens & Southern Banks was legal.

Petitioner questions the soundness of this conclusion, but what is more important is that there is no basis for the suggestion that the decision of the Supreme Court was a mere slap on the wrist.

> On its second appearance, the Supreme Court said: "In our former decision it was held that two findings were demanded: First . . . Second. The Citizens & Southern Holding Company and the Citizens & Southern National Bank were found to be indirectly controlling more than five per cent of the stock of certain 'five percent' banks. It was held that under the evidence of this finding was demanded by the action of certain of its officers and directors in acquiring such stock, selling it to selected individuals and trusts, and in treating such banks as branch banks of Citizens & Southern. It was this finding of illegal indirect control of these 'five percent' banks by the *Bank* and the *Holding Company* through certain of its officers and directors that was demanded by the evidence. This is the violation that the Commissioner must eliminate." (231 Ga., 421, 424)

To be sure in answer to petitioner's cross appeal, the Supreme Court said:

> "The Commissioner must necessarily be allowed a reasonable time in which to formulate the action required to eliminate the violations. In his discretion a reasonable time for enforcement of his directives may also be indicated in order not to seriously disrupt the financial community or the investments of individuals who purchased 'five percent' bank stock in good faith." (231 Ga., 421, 425)

The fact that the court recognized that the innocent five per cent banks and good faith purchasers of the five per cent bank stock should not be harshly treated is no indication that the Supreme Court regarded the violations of the Citizens & Southern National Bank as merely technical.

Therefore, petitioner most earnestly submits that the assertion of the Citizens & Southern National Bank that there has been no past, present or potential future competition by and among these six banks and the

Citizens & Southern's subsidiary banks should be rejected as baseless and utterly sterile.

Respectfully submitted,

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